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 9 SHERIFF LAURIE SMITH and  
 10 COUNTY OF SANTA CLARA

11 UNITED STATES DISTRICT COURT  
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 13 (San Francisco)

14 TOM SCOCCA, MADISON SOCIETY, INC.,  
 15 and THE CALGUNS FOUNDATION, INC.,

16 Plaintiffs,

17 v.

18 SHERIFF LAURIE SMITH (In her individual  
 19 and official capacity.), COUNTY OF SANTA  
 20 CLARA, and DOES 1 to 20,

21 Defendants.

No. CV11-01318 EMC

**DEFENDANTS' SUPPLEMENTAL BRIEF**

**I.**

**INTRODUCTION**

22 On November 15, 2012, the Court heard oral argument on Defendants' motion to dismiss the  
 23 First Amended Complaint. During the hearing, the Court ordered the parties to submit supplemental  
 24 briefs on the issue of whether the Sheriff is entitled to immunity under the Eleventh Amendment,  
 25 and to analyze the issue with regard to cases that have held that California District Attorneys are  
 26 state actors.

27 In *Pitts v. County of Kern*, 17 Cal. 4<sup>th</sup> 340, 353-62 (1998), the California Supreme Court  
 28 held that district attorneys are state officials for purposes of liability under 42 U.S.C. § 1983 while  
 acting in their prosecutorial capacity. The Ninth Circuit reached the same conclusion in *Weiner v.*  
*San Diego County*, 210 F.3d 1025, 1028-29 (9<sup>th</sup> Cir. 2000). Both *Pitts* and *Weiner* examined

1 California constitutional and statutory law in reaching this conclusion. Applying the same rational  
 2 as in *Pitts* and *Weiner*, the California Supreme Court held in *Venegas v. County of Los Angeles*, 32  
 3 Cal.4<sup>th</sup> 820, 839 (2004), that sheriffs act as state officials while performing law enforcement duties.

4 In *Brewster v. Shasta County*, 275 F.3d 803, 809 (9<sup>th</sup> Cir. 2001), however, the Ninth Circuit  
 5 held that sheriffs act on behalf of the county, not the state, when investigating crimes. Similarly, in  
 6 its now vacated opinion in *Bishop Paiute Tribe v. County of Inyo* 291 F.3d 549 (9<sup>th</sup> Cir.2002), the  
 7 Ninth Circuit concluded that both the district attorney and its sheriff were acting as county officials  
 8 in obtaining and executing an invalid search warrant aimed at uncovering welfare fraud.  
 9 Significantly, *Venegas* was decided three years after *Brewster*, and this Court should follow *Venegas*  
 10 and not *Brewster* because the California Supreme Court's interpretation of California law is binding  
 11 on this Court.

12 Further, when deciding whether to grant or deny an application for a license to carry a  
 13 concealed weapon, the Sheriff acts as a state, not a county, official. The California Attorney General  
 14 has direct supervision over the Sheriff in all matters pertaining to her duties and has oversight over  
 15 the application process, including approving a standard application, maintaining fingerprints, setting  
 16 a fee for such applications, and determining whether applicants are prohibited by state or federal law  
 17 from possessing, receiving, owning, or purchasing a firearm. Accordingly, the Sheriff is entitled to  
 18 Eleventh Amendment immunity.

## 19 II.

### 20 CALIFORNIA COURTS AND THE NINTH CIRCUIT HAVE CONCLUDED 21 THAT DISTRICT ATTORNEYS ARE STATE ACTORS WHEN 22 INVESTIGATING AND PROSECUTING CRIMES

23 Pursuant to 42 U.S.C. § 1983, a local government may be liable for constitutional torts  
 24 committed by its officials in accordance municipal policy, practice, or custom. *Monell v.*  
 25 *Department of Social Servs.*, 436 U.S. 658, 690-91 (1978). To hold a local government liable for an  
 26 official's conduct, a plaintiff must first establish that the official: (1) had final policymaking  
 27 authority "concerning the action alleged to have caused the particular constitutional or statutory  
 28 violation at issue;" and (2) was the policymaker for the local governing body for the purposes of the  
 particular act. *McMillian v. Monroe County Alabama*, 520 U.S. 781, 785 (1997) (noting that an

1 official can be the policymaker for the state for one type of act and the policymaker for the local  
2 government for another type of act).

3 In *McMillian*, the Court held that an official's function must be evaluated to determine  
4 whether he or she acts for the state or the county. *McMillian*, 520 U.S. at 785.  
5 The Court reviewed Alabama's constitution, statutes, and case law to determine whether a county  
6 sheriff was a state or county official for purposes of Section 1983 liability. *Id.* at 787-93. The Court  
7 found it significant that Alabama amended its constitution to list county sheriffs as executive officers  
8 who could be impeached by the State Supreme Court upon the order of the governor, which was the  
9 same procedure used for other state officials. *Id.* at 788. Further, the Court stated it was critical that  
10 the Alabama Supreme Court had similarly interpreted Alabama's constitution as prohibiting county  
11 liability predicated upon the doctrine of respondeat superior. *Id.* at 789.

13 The *McMillian* Court also focused on the fact that sheriffs in Alabama were given complete  
14 authority to enforce state criminal laws in the county and that county commissions could not instruct  
15 them in these duties. *McMillian*, 520 U.S. at 789. The Court determined that, under Alabama law, a  
16 county sheriff was a state official when carrying out his law enforcement duties even though the  
17 county paid his salary and provided his equipment, the county's citizens elected him, the Alabama  
18 code listed him as a county official, and his jurisdiction was limited to the county's borders. *Id.* at  
19 791-93.

20 In *Pitts v. County of Kern*, 17 Cal.4th 340, 353-62 (1998), the California Supreme Court,  
21 following *McMillian*, analyzed California law and held that a district attorney was a state official for  
22 purposes of Section 1983 liability while acting in his prosecutorial capacity. *Id.* at 928-34. And in  
23 *Weiner v. San Diego County*, 210 F.3d 1025, 1028-29 (9th Cir. 2000), the Ninth Circuit analyzed  
24 California law to reach the same conclusion.

25 The *Pitts* and *Weiner* courts looked to Article XI, section 1(b) of California's constitution,  
26 which states that the state legislature "shall provide for county powers, an elected county sheriff, an  
27 elected district attorney, an elected assessor, and an elected governing body in each county." Article  
28 V, section 13 of California's constitution states that the Attorney General has

1 direct supervision over every district attorney . . . in all matters  
 2 pertaining to the duties of the respective offices, and may require any  
 3 of said officers to make reports concerning the investigation, detection,  
 4 prosecution, and punishment of crime in their respective jurisdictions .  
 5 . . . Whenever in the opinion of the Attorney General any law of the  
 6 State is not being adequately enforced in any county, it shall be the  
 7 duty of the Attorney General to prosecute any violations of law of  
 8 which the superior court shall have jurisdiction, and in such cases the  
 9 Attorney General shall have all the powers of a district attorney.  
 10 When required by the public interest or directed by the Governor, the  
 11 Attorney General shall assist any district attorney in the discharge of  
 12 the duties of that office.

13 The *Pitts* and *Weiner* courts noted that there are California statutes that weigh both in favor  
 14 of and against concluding that a district attorney is a state officer. *Pitts*, 17 Cal.4<sup>th</sup> at 357-60;  
 15 *Weiner*, 210 F.3d at 1029. Provisions that support the conclusion that district attorneys are state  
 16 officers provide that: (1) all suits are to be conducted under the name of the state of California (Cal.  
 17 Govt. Code § 100(b)); (2) any county authority to review a district attorney's conduct "shall not be  
 18 construed to affect the independent and constitutionally and statutorily designated investigative and  
 19 prosecutorial functions of the sheriff and district attorney of a county. The board of supervisors shall  
 20 not . . . obstruct the investigative and prosecutorial function of the district attorney of a county" (Cal.  
 21 Govt. Code § 25303); (3) the "Attorney General has direct supervision over the district attorneys of  
 22 the several counties of the State and may require of them written reports as to the condition of public  
 23 business entrusted in their charge" and may assist the district attorney or take full charge of any  
 24 investigation or prosecution (Cal. Govt. Code § 12550); and (4) the Attorney General can "call into  
 25 conference the district attorneys . . . for the purpose of discussing the duties of their office[ ], with  
 26 the view of uniform and adequate enforcement of" state laws (Cal. Govt. Code § 12524).

27 The *Pitts* and *Weiner* courts noted that on the other hand there are California statutory  
 28 provisions that weigh in favor of concluding that district attorneys are county officers: (1) district  
 attorneys are elected by the county voters (Cal. Const., art. XI, § 1); (2) district attorneys are listed as  
 county officers (Cal. Govt. Code § 24000(a)); (3) counties set district attorneys' salaries (Cal. Govt.  
 Code § 25300); (4) district attorneys must be registered to vote in their respective counties (Cal.  
 Govt. Code § 24001); (5) counties supervise the district attorneys' conduct and use of public funds  
 (Cal. Govt. Code § 25303); and (6) district attorneys can be removed from office following the same

1 procedures as applied to district, county, and city officers, i.e., a grand jury submitting a written  
 2 accusation to the state court (Cal. Govt. Code §§ 3060 and 3073). *Pitts*, 17 Cal.4<sup>th</sup> at 361; *Weiner*,  
 3 210 F.3d at 1029-1030.

4 After balancing these constitutional and statutory provisions, the *Pitts* and *Weiner* courts  
 5 concluded that under California law a county district attorney acts as a state official when deciding  
 6 whether to prosecute an individual. *Pitts*, 17 Cal.4<sup>th</sup> at 362; *Weiner*, 210 F.3d at 1030. The fact that  
 7 California statutory law lists district attorneys as county officers was not dispositive because, as  
 8 discussed in *McMillian*, the function of the district attorney, including who can control the district  
 9 attorney's conduct, is the issue. *Id.*; see *McMillian*, 520 U.S. at 792 n.7 (giving little weight to fact  
 10 that the Alabama code listed sheriffs as county officers because the state court had held that the  
 11 constitution made sheriffs executive officers). Further, the *Weiner* court noted that the *McMillian*  
 12 Court acknowledged the relevance of the requirements that sheriffs be elected locally and live and  
 13 vote in the county, but found that these factors were not controlling. *Weiner*, 210 F.3d at 1030; see  
 14 *McMillian*, 520 U.S. at 791-92. Moreover, the *Weiner* court held that while California statutory law  
 15 gives a county some authority to oversee a district attorney's conduct, it expressly excludes conduct  
 16 related to the investigation and prosecution of crimes, giving that authority instead to the Attorney  
 17 General. *Weiner*, 210 F.3d at 1030; see Cal. Govt. Code §§ 26303 and 12550. The *Weiner* court  
 18 concluded that "the only significant differences between California law applicable in this case and  
 19 Alabama law applicable in *McMillian* are that under California law the county sets the district  
 20 attorney's salary and the district attorney can be removed from office in a fashion similar to other  
 21 county employees. These differences are not sufficient to produce a result in this case different from  
 22 the result in *McMillian*." *Id.*

23 With regard to a California county's ability to set a district attorney's salary, the *Weiner* court  
 24 looked to *Pitts*, which held that this " 'does not translate into control over him . . . .'" *Weiner*, 210  
 25 F.3d at 1030 (quoting *Pitts*, 70 Cal.Rptr.2d 823). In addition, the *Weiner* court observed that  
 26 although California Government Code section 25303 authorizes a county through its Board of  
 27 Supervisors to "supervise the district attorney's official conduct and in particular his or her use of  
 28 public funds," that section precludes a county from obstructing "the investigative and prosecutorial

1 function of the district attorney of a county.” *Id.* (quoting Cal. Govt. Code § 25303).

2 With regard to the fact that district attorneys in California can be removed from office in the  
3 same fashion as other county officers, the *Weiner* court held that “this does not mean they are within  
4 the control of the county. The removal process authorizes a county grand jury to vote to remove a  
5 district attorney from office, but requires the appointment by the state court of a prosecutor to  
6 ‘conduct the proceedings.’” *Weiner*, 210 F.3d at 1030 (quoting Cal. Govt. Code § 3073).

### 7 III.

#### 8 **The California Supreme Court held in *Venegas* that Sheriffs are agents 9 of the state when acting in their law enforcement roles**

10 In *Venegas v. County of Los Angeles*, 32 Cal.4<sup>th</sup> 820, 839 (2004), the California Supreme  
11 Court held that in California sheriffs “act as state officers while performing state law enforcement  
12 duties.” The *Venegas* court examined a state appellate decision, *Peters*, which applied the  
13 *McMillian/Pitts* analysis to conclude that California sheriffs act as state officers in setting policies  
14 governing release of prisoners from the county jail. *Id.* at 833 (citing *County of Los Angeles v.*  
15 *Superior Court (Peters)*, 68 Cal. App. 4<sup>th</sup> 1166, 1174–75). Both *Venegas* and *Peters* noted that the  
16 same constitutional and statutory provisions governing district attorneys considered in *Pitts* also  
17 apply to sheriffs. *Venegas*, 32 Cal.4<sup>th</sup> at 833; *Peters*, 68 Cal.App.4<sup>th</sup> at 1174.

18 For example, Article V, section 13 of the California Constitution provides that subject to the  
19 powers and duties of the Governor, “[t]he Attorney General shall have direct supervision over every  
20 district attorney and sheriff and over such other law enforcement officers as may be designated by  
21 law, in all matters pertaining to the duties of their respective offices, and may require any of said  
22 officers to make reports concerning the investigation, detection, prosecution, and punishment of  
23 crime in their respective jurisdictions as the Attorney General may seem advisable.”

24 Similarly, Government Code section 12560, which relates to sheriffs, is substantially  
25 identical to Government Code section 12550, which relates to district attorneys and was relied on in  
26 *Pitts*. *Venegas*, 32 Cal.4<sup>th</sup> at 834. Section 12560 gives the Attorney General “direct supervision” of  
27 all sheriffs, with power to order reports “concerning the investigation, detection and punishment of  
28 crime in their respective jurisdictions,” and to direct their activities regarding these investigations.

1 The *Venegas* court also cited Government Code sections 26600 (sheriffs' duty to preserve the peace  
 2 through crime prevention projects); 26601 (sheriffs' authority to arrest criminal offenders), and  
 3 26602 (sheriffs' duty to prevent breaches of peace and investigate public offenses).

4 In addition, as in *Pitts* with respect to district attorneys, the county board of supervisors has  
 5 no direct control over a sheriff's performance of law enforcement functions. *Venegas*, 32 Cal.4<sup>th</sup> at  
 6 834. Government Code section 25303, upon which *Pitts* relied for this proposition, applies to both  
 7 offices. *Id.* Among other things, that section reaffirms

8 the independent and constitutionally and statutorily designated  
 9 investigative and prosecutorial functions of the sheriff and district  
 10 attorney of a county. The board of supervisors shall not obstruct the  
 11 investigative function of the sheriff of the county nor shall it obstruct  
 12 the investigative and prosecutorial function of the district attorney of a  
 13 county. [¶] Nothing contained herein shall be construed to limit the  
 14 budgetary authority of the board of supervisors over the district  
 15 attorney or sheriff.

16 *Venegas*, 32 Cal.4<sup>th</sup> at 834 (quoting Cal. Govt. Code, § 25303).

17 As in *Pitts*, *Peters* acknowledged that other constitutional and statutory provisions tended to  
 18 support a theory of county agency. For example, article XI, sections 1, subdivision (b), and 4,  
 19 subdivision (c), of the California Constitution provide for "an elected sheriff" in each county, and  
 20 Government Code section 24000 includes sheriffs within the general category of county officers.  
 21 But as in *Pitts*, *Peters* concluded that these provisions were outweighed by those supporting the  
 22 argument that sheriffs are not policy makers for the county board of supervisors but are functionally  
 23 independent of county control when performing their law enforcement functions. *Peters*, 68  
 24 Cal.App.4<sup>th</sup> at 1176–77.

25 Thus, after analyzing state constitutional and statutory provisions and the analysis of the  
 26 appellate court in *Peters*, the California Supreme Court held in *Venegas* that California Sheriffs act  
 27 on behalf of the state when performing law enforcement activities, and, as state agents, are  
 28 absolutely immune from prosecution for asserted civil rights violations in actions under 42 U.S.C. §  
 1983. *Venegas*, 32 Cal.4<sup>th</sup> at 835.

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## IV.

**Two Ninth Circuit cases, *Brewster* and *Bishop*, have effectively been overruled in *Venegas* by the California Supreme Court, which is the ultimate interpreter of California state law**

The Ninth Circuit held in *Brewster v. Shasta County*, 275 F. 3d 803, 809 (9th Cir. 2001) – which was decided three years before the California Supreme Court’s decision in *Venegas* – that a sheriff acts for the county, not the state, when investigating crimes. The court concentrated on such factors as (1) inclusion of sheriffs as county officers in state Constitution Article XI, section 1, subdivision (b), and Government Code section 24000; and (2) county supervision of sheriffs’ activities under Government Code section 25303. *Brewster*, 275 F.3d at 806–808. The *Venegas* court rejected *Brewster*’s analysis, noting that *Pitts* and *Peters* found these factors insufficient to establish a county agency relationship. *Venegas*, 32 Cal.4<sup>th</sup> at 835 (citing *Pitts*, 17 Cal.4<sup>th</sup> at 360–362 and *Peters* 68 Cal.App.4<sup>th</sup> at 1176).

*Brewster* also deemed significant the fact that monetary damages assessed against sheriffs for Section 1983 claims would be paid by the counties, not the state. *Brewster*, 275 F.3d at 808 (citing Cal. Govt. Code § 815.2(a) [vicarious liability of government agencies for employee’s torts]). The *Venegas* court rejected this analysis, noting that California Government Code section 815.2(a) applies to both the state and counties, and although it may provide a general basis for vicarious public liability, subdivision (b) of the section immunizes both the state and county from torts that are committed by employees who are themselves immune. *Venegas*, 32 Cal.4<sup>th</sup> at 835.

The *Venegas* court determined that the *Brewster* analysis was faulty for other reasons. As *Brewster* earlier acknowledged, if sheriffs indeed are acting as state agents in crime investigations, they would be immune from liability under Section 1983 if sued in their official capacity, and their counties would not be liable for their actions. *Venegas*, 32 Cal.4<sup>th</sup> at 836 (citing *Brewster*, 275 F.3d at 805 [“if [the sheriff] is a policy maker for the state, then the county cannot be liable for his actions”]). But even assuming California sheriffs lack such immunity, the fact that counties may be called on to pay any tort damage judgment rendered against sheriffs sued in their personal capacity is only one of the many factors *McMillian* requires courts to consider. *Venegas*, 32 Cal.4<sup>th</sup> at 836. The *Venegas* court held that “[t]hat single factor, if it truly exists, is outweighed by the constitutional and



1 statutory provisions discussed above, demonstrating that a sheriff represents the state, not the county,  
 2 when performing law enforcement duties in his official capacity.” *Id.*

3 In *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 553 (9th Cir. 2002) vacated *sub nom.*  
 4 *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S.  
 5 701 (2003),<sup>1</sup> a Native American tribe and its wholly owned gaming corporation sued the County of  
 6 Inyo, its district attorney, and its sheriff, seeking equitable and monetary relief and alleging these  
 7 defendants conducted an unlawful records search on tribal property. In its now vacated opinion in  
 8 *Bishop*, the Ninth Circuit concluded that both the district attorney and sheriff were acting as county  
 9 officers in obtaining and executing an invalid search warrant aimed at uncovering welfare fraud.  
 10 *Bishop*, 291 F.3d at 562–566. As in *Brewster*, the *Bishop* court relied on such factors as (1)  
 11 inclusion of district attorneys and sheriffs as county officers in state Constitution article XI, section  
 12 1, subdivision (b), and Government Code section 24000; and (2) county supervision of the district  
 13 attorney’s and sheriff’s activities under Government Code section 25303. *Bishop*, 291 F.3d at 563–  
 14 564.

15 Acknowledging the constitutional and statutory supervisory authority of the state Attorney  
 16 General over district attorneys and sheriffs in their law enforcement functions, the *Bishop* court  
 17 nonetheless expressed concern that “to allow the Attorney General’s supervisory role to be  
 18 dispositive . . . would prove too much,” for “if taken to its logical extreme, all local law enforcement  
 19 agencies in California would be immune from prosecution for civil rights violation,” contrary to  
 20 *Monell’s* holding preserving section 1983 actions against local agencies. *Bishop*, 291 F.3d at p. 564.

21 *Venegas* rejected this analysis:

22 To the contrary, merely because the sheriff is a state officer . . . does  
 23 not mean that all local law enforcement officers are also to be deemed  
 24 state officers. *Pitts* and *Peters* are clearly confined, respectively, to  
 25 situations in which district attorneys and sheriffs are actually engaged  
 26 in performing law enforcement duties, such as investigating and  
 prosecuting crime, or training staff and developing policy involving  
 such matters. Immunizing these persons when actually engaged in  
 such activities would not violate *Monell’s* broad refusal to find all  
 local agencies immune from suit under section 1983. . . . Moreover,

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27  
 28 <sup>1</sup> The United States Supreme Court held that tribe was not a “person” who could sue under Section 1983.

*Bishop's* analysis appears to express a policy concern (overly broad immunity from suit) that is extraneous to the high court's factor-balancing test employed in *McMillian*, a test that, as *Brewster* acknowledged, requires a weighing of the state's Constitution, statutes, and case law.

*Venegas*, 32 Cal. 4th at 837-38.

Interpretation of state law by a state's highest court is binding on federal courts. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Thus, *Venegas's* conclusion that sheriffs act as state officers in performing their law enforcement activities is binding on this Court.

## V.

### **The Sheriff acts as a state official when exercising her discretion to grant or deny applications for licenses to carry concealed weapons**

The California Attorney General has direct supervision over Sheriff Laurie Smith in all matters pertaining to her duties, including her exercise of discretion in granting or denying applications for licenses to carry concealed weapons. The California Attorney General approves a standard application for such licenses that must be used throughout the state, and applicants cannot be required to complete any additional forms. Cal. Pen. Code § 26175(a)(1) and (g). The fingerprints of each applicant must be taken on forms prescribed by the Department of Justice, which must be forwarded to the department. Cal. Pen. Code § 26185(a)(1). The Department of Justice also prescribes a fee that applicants must pay when submitting an application. Cal. Pen. Code § 26190(a)(1). Moreover, a license to carry a concealed weapon may not be issued if the Department of Justice determines that the applicant is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm. Cal. Pen. Code § 26195(a).

In contrast, the County Board of Supervisors has no control over the Sheriff's exercise of discretion in granting or denying applications for licenses to carry concealed weapons. The County Board of Supervisions has no authority to alter the application form approved by the California Attorney General. The County Board of Supervisors has no oversight of fingerprints taken of each applicant and is not responsible for maintaining fingerprints. Further, the County Board of Supervisors cannot set a fee that applicants must pay when submitting an application.

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1 Thus, the Sheriff acts as a state official when exercising her discretion to grant or deny  
2 applications for licenses to carry concealed weapons. As such, she is immune from liability under  
3 42 U.S.C. § 1983 by virtue of the Eleventh Amendment and the doctrine of sovereign immunity.

4 Dated: November 21, 2012

Respectfully submitted,

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